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Bess Nkabinde

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The Right to Strike, an Essential Component of Workplace Democracy: Its Scope and Global Economy

BESS NKABINDE*

It is not a question of asking business to fulfill the role of government, but of asking business to promote human rights in its own sphere of competence.

—Mary Robinson¹

INTRODUCTION

Globalization and investment across borders are intensifying in most democratic societies. Economic development increasingly continues to be the major underlying factor. In pursuit of lower costs, transnational corporations use off-shoring to allocate production and other parts of their value chains to developing countries where labor costs are significantly lower than in most developed countries. Along with these lower wages generally come poorer working conditions. As a result, most workers are increasingly left vulnerable. Increasing international competition for investment between states also results in labor standards being sacrificed to reduced production costs and increased profitability, thus encouraging foreign capital.²

Some corporations meet their obligations to respect human rights within a country's borders. Yet, in states where human rights pro-

* Justice, Constitutional Court of South Africa, and Distinguished Visiting Professor of Law, University of Maryland School of Law. Justice Nkabinde presented this paper at the University of Maryland School of Law Symposium, "Reflecting on the 60th Anniversary of the Universal Declaration of Human Rights," October 23–25, 2008.

1. Mary Robinson, *The Business Case for Human Rights*, in VISIONS OF ETHICAL BUSINESS (1998).

2. Ignacio A. Donoso Rubio, *Economic Limits on International Regulation: A Case Study of ILO Standard-Setting*, 24 QUEENS L.J. 189, 219 (1998).

tection is often weaker, these corporations adopt a different approach and are prepared to violate human rights or, possibly, only comply with a lower threshold of the protection that the countries offer. Similar problems arise when corporations enter into agreements with other corporations in their supply chain that are implicated in human rights abuses. Many questions arise. A few questions that come to mind are: (a) do corporations have responsibilities for the realization of human rights?; if so, (b) do the human rights obligations of corporations extend extra-territorially? These are important issues because the decisions and activities of many large multinational corporations are capable of doing more harm to persons and resources in ways that frustrate the realization of human rights. These are complex issues that I do not attempt to address in this essay.³

All these things, which seem to be mainly about economic development and accumulation of wealth, are often given priority at the detriment of human rights. In a turbulent global economy, it is necessary to take stock and examine policies that will ensure sustained growth and profits shared by all,⁴ at the same time ensuring that human rights are not compromised.

Today, the Universal Declaration of Human Rights (UDHR) and international Conventions seem to be accorded less respect than during the immediate post-World War II era. The focal point appears to shift particularly with regard to more wealthy and self-confident regimes where human rights come second to amassing great wealth. This might be encouraged by foreign policy decisions that fail to take into account the human rights practices of the state with which some Western countries are dealing. Most Asian regimes' resistance to Western human rights pressure comes to mind. Some scholars have

3. It suffices to state that the text of the South African Constitution does not distinguish actions by private parties inside the country or abroad. As far as I can recall, the Constitutional Court has not yet addressed the question directly, save when it considered whether or not the Bill of Rights binds the actions of the South African government beyond its borders. Law reform might be a route to adopt in order to address these critical issues because many corporations based in democratic countries such as South Africa are involved in businesses in other parts of Africa where legal systems are weaker and political systems, at times, corrupt. The form of corporations itself is problematic because it often immunizes companies from full responsibility for their actions, for example, where a holding company, because of the complex company structures that in law suggest separateness, claims non-responsibility for actions of its subsidiary even if the subsidiary caused widespread human rights violations.

4. This has resonance with a basic lesson we learned as children—the importance of sharing, supplemented by other valued life lessons.

observed that Western businesses in the U.S. and Europe, anxious to expand their trade with and their investment in the rapidly growing East Asian countries, subjected their respective governments to intense pressure not to disrupt economic relations with those Asian regimes. In addition, the Asian countries considered the pressure by the West to be an infringement on their sovereignty and rallied to each other's support when these issues arose. Those who invested in China⁵ also supported China's retention of its benefits with the United States. The Japanese government generally distanced itself from the United States' human rights policies by maintaining after the Tiananmen Square incident that it would not let abstract notions of human rights affect its relations with China. Overall, the growing economic strength of the Asian countries rendered them increasingly immune to Western pressure concerning human rights problems.⁶

The question is: How do we counter these forces in modern democracies?

The general thematic points I highlight in this essay relate to the right to strike⁷ as an essential component of workplace democracy. The points discussed (although not in the order in which they are mentioned here) include the scope of the right and its effect in relation to the pervasive economic forces that are intensifying in most democratic societies and elsewhere in the world. I briefly mention, in passing, the influence of international human rights law with specific reference to South Africa.

COUNTERMEASURES AGAINST DETRIMENTAL ECONOMIC FORCES

The UDHR is one of the first major achievements of the United Nations organization⁸ and was adopted in 1948 by forty-eight Mem-

5. I.e., Taiwanese, Japanese, and Hong Kong investors.

6. Richard Nixon observed in 1994 that: "China's economic power makes U.S. lectures about human rights imprudent. Within a decade it will make them irrelevant. Within two decades it will make them laughable." RICHARD NIXON, *BEYOND PEACE* 127-28 (1994).

7. In some jurisdictions, this right is complemented by the employer's right to lock-out, thus maintaining a balance of power between workers on the one hand and employers on the other.

8. It is linked with at least six founding texts:

(a) Declaration of Four Freedoms, President Franklin Delano Roosevelt, Annual Message to Congress (Jan. 6, 1941), *in* 9 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 663 (Samuel I. Rosenman ed., 1950) (declaring that "freedom is the existence of human rights everywhere").

(b) The Atlantic Charter, Joint Declaration by the President of the United States and

ber States.⁹ It guarantees every person the right “to freedom of . . . association” and “to form and to join trade unions for the protection of his interests.”¹⁰

the Prime Minister of the United Kingdom, 55 Stat. 1603 (Aug. 14, 1941), (explaining the objectives of the war and reaffirmed the four freedoms: the freedom of opinion, of expression, of religion, and the right to basic need).

- (c) The Declaration Concerning the Aims and Purposes of the International Labor Organization, Oct. 9, 1946, 15 U.N.T.S. 35 (setting forth the concern of Member States and their citizens regarding human rights).
- (d) The Draft Agreement of the Dumbarton Oaks Conference (October 7, 1944), which became the Charter of the United Nations, provided that “respect of human rights and fundamental freedoms” depended on the return of peace.
- (e) The Act of the Chapultepec Conference (February 21 to March 8, 1945), at which twenty-one states of the American Continent met and affirmed the equality of all rights for all men “whatever their race or their religion.”
- (f) The San Francisco Conference adopted the Charter of the U.N. (June 26, 1945) refers seven times to human rights. The Charter proclaims the faith of the U.N. in the dignity and value of the human person, in the equal rights of men and women, and of nations large and small, and establishes conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained without distinction as to race, sex, language, or religion.

9. Australia, Afghanistan, Argentina, Belgium, Burma, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Iceland, India, Iraq, Iran, Lebanon, Liberia, Luxemburg, Mexico, The Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Siam, Sweden, Syria, Turkey, United Kingdom, United States of America, Uruguay, and Venezuela. South Africa was one of the eight Member States that abstained.

10. Universal Declaration of Human Rights, G.A. Res. 217A (III), arts. 20(1), 23(4), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]. See also:

- (1) International Labour Organization [ILO], *Freedom of Association and Protection of the Right to Organize Convention*, Gen. Conf. No. 87 (July 9, 1948) [hereinafter ILO Convention 87] (relating to freedom of association and protection of the right to organize) and *Right to Organise and Collective Bargaining Convention*, Gen. Conf. No. 98 (June 8, 1949) [hereinafter ILO Convention 98] (referring to the rights to organize and collective bargaining). Both ILO Convention 87 and ILO Convention 98, along with eight others, have been identified by the ILO Governing Council to be its core Conventions;
- (2) International Labour Organization [ILO], *Collective Bargaining Convention*, Gen. Conf. No. 154 (June 3, 1981) [hereinafter ILO Convention 154]. The Preamble to ILO Convention 154 reaffirms the provision of the Declaration of Philadelphia recognizing “the solemn obligation of the [ILO] to further among the nations of the World programmes which will achieve . . . the effective recognition of the right of collective bargaining.” *Id.* Further, I.L.O. Convention 154 is not restricted to labor trade unions but “shall apply to all branches of economic activity.” *Id.* art. 1. Public employees, as well as other workers, also have the civil and political rights essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their function; and

Viewing labor rights as part of a wider struggle for democracy is essential for the growth of the labor movement. Most people believe in democracy in their polity but seem to be unable to imagine having democracy in their workplace. For more than a century, trade unions have sought to identify the right to strike as an essential part of democracy, along with many other rights. However, the common law courts have always regarded strikes as a breach of contract and picketing, depending on the violence employed, as a criminal act. Most courts declined to hear plaintiffs who sought redress from union militancy by directing them in the first instance to industrial relation tribunals.¹¹

Although the Universal Declaration of Human Rights is not legally binding, its principles have acquired the status of standards respected by many states and its impact has moved it in the direction of universal acceptance. It has also become a common reference in the human rights field for many nations. Many governments have incorporated the provisions of the Declaration in their constitutions, making it legally binding upon those states. Interestingly, although South Africa was one of the eight countries that abstained when the UDHR was presented and adopted in Paris in 1948, South Africa is the quintessence of countries in the world that have incorporated the provisions of the Declarations and most of the subsequent Conventions in its Constitution and labor laws.

The exploitation of workers was a feature of life in South Africa for a long time. Apartheid thrived on cheap labor: workers had to contend with the migrant labor system, passes and influx control, job

(3) Article 8(1) (d) of the International Covenant on Economic, Social and Cultural Rights provides that the States parties to the Covenant shall undertake to ensure: "the right to strike, provided that it is exercised in conformity with the laws of the particular country." International Covenant on Economic, Social and Cultural Rights art. 8(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The ICESCR also provides: "Each State Party to the present Covenant undertakes to take steps . . . with a view to achieving progressively the full realization of the right recognized in the present Covenant by all appropriate means, including particularly the adoption of the legislative measures." *Id.* art. 2(1).

11. At the end of the day, the common law court would hear appeals for redress, but for small-to-medium sized businesses, justice delayed was usually justice denied because the business could quickly become insolvent by the time the arbitral tribunal considered the matter but trade unions were aware that their work stoppage would persuade the employer to adopt a more pragmatic solution because of the loss of cash flow which drawn-out legal process entailed.

reservation, poverty and oppressive laws. Trade unions were nevertheless an important source of resistance.¹²

The South African Constitution contains a detailed provision directed towards balanced protection for workers and trade unions as well as employee and employer associations in labor relations and collective bargaining.¹³ Section 23 guarantees workers the right to fair labor practices, to form and join trade unions, and to participate in union activities and strikes.¹⁴ Likewise, employers have the right to form and join employers' organizations and to take part in their activities. These groups have the right to organize, form federations, and engage in collective bargaining.¹⁵

The right to strike is entrenched in the South African Constitution;¹⁶ but, the right of employers to lock out their workers is not expressly included.¹⁷ The Labour Relations Act (LRA) came into force on November 11, 1996, and was intended to bring labor law into conformity with the Constitution and with international law. It recognizes and regulates the rights of workers to organize and join trade unions, as well as the right to strike. The LRA guarantees trade union representatives access to the workplace and regulates the right of employers to lock workers out in certain situations. In addition to these guarantees, the LRA facilitates collective bargaining and makes provision for bargaining councils. It establishes bodies such as the Commission for Conciliation, Mediation and Arbitration, which creates simple procedures for the arbitration and resolution of labor conflicts, and the Labour Court and Labour Appeal Courts, which adjudicate disputes. The legislation prohibits unfair dismissal and defines dismissal as automatically unfair if it is due to the exercise of labor rights (including participation in or support for a legal strike or protest), pregnancy, or unfair discrimination on the grounds of race, gender, and others grounds.

12. In the 1980s, the Congress of South African Trade Unions (COSATU) organized mass strikes against new labor laws and workers emerged as a strong political force.

13. The most relevant provision for the purpose of this discussion is section 23. It deals specifically with labor relations. *See* S. AFR. CONST. 1996 s. 23.

14. S. AFR. CONST. 1996 s. 23(1), (2)(a)–(c). It is noteworthy that the rights afforded to citizens generally apply to workers too. These include the rights to equality, privacy, dignity, and life.

15. *Id.* s. 23(3).

16. This is protected in *id.* s. 23(2)(c).

17. However, the "Labour Relations Act" (LRA) grants an employer this right in certain situations. *See* Labour Relations Act 66 of 1995 as amended (2002).

The South African Constitution recognizes that there are potent lessons to be learned not only from the apartheid past, but also from the experience of other countries around the world. It enjoins the Constitutional Court, when interpreting the Bill of Rights, to consider international law and it encourages the courts to use foreign law. The conventions and recommendations of the International Labour Organization (ILO),¹⁸ one of the oldest international organizations in existence, are some of the important resources for the interpretation of the labor provisions in the Constitution and the LRA.

THE SCOPE OF THE RIGHT

Traditionally, the ability of workers to take industrial action was an important factor in the maintenance of fair wages and reasonable working conditions, thereby improving the economic and social welfare of a significant proportion of the population. This was and continues to be based on the understanding that there is an imbalance in bargaining power between an employer and employee such that, in the absence of a right to strike, collective bargaining would amount to "collective begging." The social justice argument seems to have won judicial and legislative recognition of the entitlement of workers to take industrial action in certain countries.

A worker has no other means of defending his or her real wage other than seeking an increased money wage. If an employer does not grant such an increase, he or she can be forced to come to a negotiation table by striking workers. The worker can do this because employer earnings are contingent upon the workers continuing to work. The argument is based on the fact that the employer's income is nothing other than what is alienated from the worker in the process of production. When workers stop working, employers stop earning. It needs to be said, however, that the withdrawal of labor has a detrimental effect on the profits of business and the economy as a whole,¹⁹ indirectly placing pressure on business and state to heed workers' demands.²⁰

18. "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorization." ILO Convention 87, *supra* note 10, at art. 2.

19. The same applies to government workers as well. When they strike, the general public suffers.

20. In India, however, the Supreme Court held that the right to strike does not exist for

In recent years, the reasons for legal protection of strikes increasingly cover a wide spectrum. Industrial action may be socio-economic in nature and may be derived from the application of commonly recognized civil liberties. It therefore forces authorities to come to a negotiation table mainly under economic pressure or in deference to the majority public opinion.²¹ In pursuit of amassing great wealth to the detriment of human rights, and aided not least by the fact that the movement of capital is widely accepted, astute businessmen close factories and move capital overseas when they consider that a state's economic or social policies are unsatisfactory and do not promote their financial interests. As I mention later in this essay, these are some of the instances where the pressure of industrial action in the form of strike might effectively bite.

WORKPLACE DEMOCRACY

Democracy is not limited to politics but extends to business.²² In recent times, the corporate workplace model seems to dominate in many societies, especially in developed countries. Tactics are thus important to revitalize the labor movement for the attainment of workplace democracy. These tactics need to arise out of a new sense of entitlement created when employees have a feeling of ownership.

Translated to the business world, the idea of democracy in the workplace involves management that is less autocratic and confers more power on individual employees. Workplace democracy is seen by many as the key to developing a culture of ownership in the organization and is thus crucial to enhancing competitiveness and productivity, to fostering creativity and innovation, and to combating turnover and disengagement.

It has been observed that the majority of the employees who have

government employees. *T.K. Rangarajan vs. Government of Tamil Nadu*, (2003) 6 S.C.C. 581 (India). (It is remarkable though that the right to strike has been recognized by the Court as a legal right.) The Court left untouched the government's right to lock-out—a right complementing the employees' right to strike, thus tilting the balance of power in favor of the State and considerably reducing the employees' or trade union's bargaining strength. The right to form an association would be rendered illusory if such a right does not carry with it the concomitant right to strike.

21. The latter resting on the belief of majoritarian representative democracy.

22. Many scholars believe that the gradual nature of transition from authoritarian governance to democratic governance is necessary to ensure a smooth transition. It is said that countries where movement towards workplace democracy in great strides has led to unnecessary interruption to the economic growth in those countries.

been given more power to contribute in decision-making and on how to do their day-to-day work felt a greater deal of ownership and took pride in their tasks. They became more motivated to succeed. They worked unsupervised and felt a strong sense of ownership because there was no "them and us." The point I make is that workers must appreciate that while they participate in the upside of the business when the company is successful, they will also share in the consequences of poor company performances, either via layoffs or decreased compensation. This seems to be one of the most effective ways to align employees' interest with those of the employer, especially in smaller businesses.

I hasten to mention, however, that conferment of power to workers is not, in itself, a panacea for industrial challenges. It is, on its own, certainly not sufficient to provide employers with an incentive to respond to workers' concerns. In Taiwan, for instance, the Fair Labor Standards Law stipulates that all enterprises must establish labor-management committees for the purpose of providing unions and management, or employees and management representatives, with a platform for the discussion of matters relating to workers' benefits. Although most companies seem to ignore the provision, more workers demand their employers to form the requisite labor-management committees so that they can participate in the management decision-making processes. It is observed that the percentage of all labor-management committees formed in the private sector increased substantially in 2002.²³ It has been pointed out though that such union directors have not been very helpful to the workers they represent mainly because most do not have experience at board level due to a lack of knowledge and skill.

Although the initiative, in the form of workers' participation in workplace decision-making, seems to diminish unchallenged managerial prerogatives, some critics hold the view that workforce participation is an exercise in futility. They argue that the participation allows only token involvement of workers in the decision-making process so that their actions do little more than legitimate decisions taken by management. Commenting on European developments, Lord Wedderburn sounded a warning: "the right to consult must be measured alongside the right, in law or practice, to negotiate.

23. For example, union officials have been allowed to serve as members of the board of directors of China Petroleum Company and the Board of Directors of Taipei Bank.

Without the constraints of autonomous collective bargaining, management prerogative can turn consultation into a highway for personalized contracts.”²⁴

It is contended that to achieve the most participation and meaningful workplace democracy, workers themselves ought to know things that the employer cannot afford not to know herself or himself. So, workplace democracy becomes a mechanism for getting workers to share what they already know with their bosses as well as their co-workers. Examples of such businesses are the taxi industry and the garbage business, which are hard to supervise. Employees go off and work where their employers cannot watch them. It follows that employers who cannot directly supervise and measure employees’ performance must trust them.

The question is, how does the employer make them trustworthy? Workplace democracy: the employer should hold meetings for the purpose of generating consensus about the policies of the business or industry. She or he needs to create self-enforcing rules, to get a labor force to agree collectively on what the standards will be and how they will be enforced. These are just some of the various ways to deal with the challenge. The point I make is that some types of work, especially those involving specific skills, require communications between employers and workers.

Be that as it may, it needs to be stressed that workers must possess some external source of bargaining power. If it is the strike or the threat of embarking on an industrial action that provides employers with an incentive to respond to workers’ concerns, then any effective form of workplace democracy should include the right of workers to embark on industrial action to exert pressure on management even if they are represented at the managerial level by a workers’ director. Needless to say, industrial action will, in most cases, have a ripple effect. But, in a democracy, that is the structured and effective way to force the employer to the negotiating table and to listen.

The complementary justification for the right to strike is significant. If the right to strike is justified as a basis of industrial democracy, and not merely as a means to ensure fair working conditions, the scope of the right to strike is broadened. In this way, workers will be able to embark on industrial action, not only when

24. Wedderburn, Lord, *Consultation and Collective Bargaining in Europe: Success or Ideology?*, 6 I.L.J. 1, 23 (1997).

their wages or working conditions are directly at stake, but also (as is evident from the examples mentioned below) when they are opposed to the way in which an enterprise is being run. The decisions management makes might, in some instances, precipitate insolvency and massive retrenchments based on operational requirements or threaten other socio-economic rights.

Although the UDHR speaks of the right to association and to form trade unions for the protection of a worker's interests, there are instances where workers engage in industrial action not for material self-interest but when legitimately defensible interests of a different kind are at stake. Such industrial action could be considered justifiable on the grounds of broad social implications (viz. socio-economic implications), individual conscience and moral autonomy, or as an extension of free speech. For example, strikes or threats to embark on industrial action in the following instances were not directly connected to workers' self-interest and had minimal relevance to their conditions of employment, but were taken for reasons aimed at policies of certain employers or states that had no direct relevance whatsoever to their own interests.

South Africa

Early in October, 2008, the Congress of South African Trade Unions (COSATU) and its transport and military affiliates (including the Anti-War Coalition and Earthlife Africa) called for a mass protest against the U.S. aircraft carrier USS Theodore Roosevelt that had seemingly been invited by the South African government to dock in the Table Bay harbor. COSATU accused the South African government of "paving the way for an armed assault on the people of Iran and the working class across the globe." It said that the mass demonstration was due to the fact that:

[T]he mass killing of innocent people in Afghanistan and Iraq was carried out by the pilots and soldiers of this ship. Although there were many atrocities that were carried out . . . one that comes to mind was the bombing of a wedding celebration in Afghanistan, launched from this ship. For mass murder in Afghanistan this ship and its crew were awarded medals by the US government.²⁵

25. See COSATU Daily News, Oct. 3 2008, at 3.1, available at <http://www.cosatu.org.za>

Great Britain

In 1977 a threat was made on behalf of the members of the Association of Broadcasting Staff to the British Broadcasting Corporation that the union members would take “whatever industrial action necessary” to prevent the 1977 Football Association Cup Final from being relayed via satellite to South Africa.²⁶

Australia

In Australia, the New South Wales Branch of the Australian Building Construction Employees and Builders’ Labourers’ Federation refused to take jobs constructing a luxury complex on undeveloped bush land, on the “green belt” of Sydney, and demonstrated respect to the community views in opposing the project.²⁷

United States

The International Longshoremen’s Association refused to load and unload goods destined for, or originating in, the Soviet Union following its invasion of Afghanistan. The union’s protest was predominantly aimed at the employer’s continued trade with the Soviet Union, whose actions they viewed as morally reprehensible.²⁸

CONCLUSION

It is important to consider the UDHR principles as a “web of mutually supporting rights”²⁹ in the international human rights arena. These rights, taken together, implicitly recognize the importance of industrial action as an essential workplace democracy both for a democratic society and for individuals personally. The corollary of

/news/today/today.htm.

26. See *BBC v Hearn* [1977] 1 W.L.R. 1004.

27. Seth Kupferberg, *Political Strikes, Labor Law and Democratic Rights*, 71 VA. L. REV. 685 (1985), points out that:

Constructional democratic procedures had not decided how to develop Sydney before the laborers stepped in: profit-making builders had. The green bans may be understood, therefore, as taking one step further a union goal traditionally applied to setting wages and other conditions of employment: substituting a conscious group decision for a market determination seemingly independent of human will.

Id. at 743.

28. See *Int’l Longshoremen’s Assoc. v. Allied Int’l, Inc.*, 456 U.S. 212 (1982); see also *Jacksonville Bulk Terminals, Inc. v. Int’l Longshoremen’s Assoc.*, 457 U.S. 702 (1982).

29. See *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC) para. 27 (S. Afr.).

such an approach is tolerance by society or societies of one another. In essence, tolerance does not require approbation of a particular view, but the acceptance of the public refusing to silence unpopular views.

Some scholars hold the view that industrial action in the form of a strike is unacceptable and that compulsory mediation, conciliation, and arbitration should be introduced in its place. While there may be merit in this view, such a substitution might serve the employer's interest as opposed to those of the workers or trade union. That, in my view, will make the commitment to promote labor rights imprudent and consequently irrelevant. Moreover, the substitution will tilt the balance of power in favor of the employer and considerably reduce the employees' or trade union's bargaining strength. The UDHR right to form trade unions and associate might then be rendered illusory.

Finally, national governments might have to revisit their labor policies with a view to promote labor rights and address the critical labor challenges the world faces today.